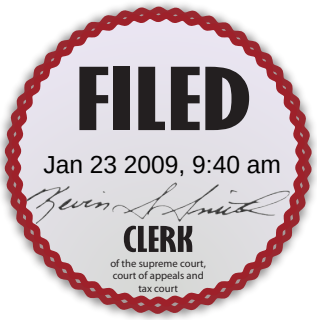

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IN THE COURT OF APPEALS OF INDIANA

ADHAM A. EL-KHATIB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0807-CR-344
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0804-FD-357

January 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Adham El-Khatib appeals his three-year sentence for Class D felony fraud and Class D felony receiving stolen property. We affirm.

Issues

El-Khatib raises two issues which we restate as:

I. whether the trial court abused its discretion when it sentenced him; and

II. whether his three-year sentence is appropriate.

Facts

On April 28, 2008, El-Khatib was charged with Class D felony fraud for using someone else's credit card and Class D felony receiving stolen property for retaining the stolen credit card. On May 9, 2008, El-Khatib pled guilty as charged. On May 23, 2008, following a hearing, the trial court sentenced him to three years on each count and ordered the sentences to be served concurrently. The trial court ordered the three-year sentence to be served consecutive to three other previously-issued sentences. In sentencing El-Khatib, the trial court stated:

> You know, I was just trying -- the -- I'm not trying to say that Blakely's the same -- Blakely's a bigger piece of crap than Mr. Khatib is here, it seems to me. . . .[1] Find as aggravating

[1] The trial court was not referring to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Instead, the trial court was referring to a defendant it had previously sentenced, Sharico Blakely. Three days before El-Khatib was sentenced, a panel of this court reversed Blakely's sentence of 100 years and remanded for trial court to impose a sixty-year sentence. See Blakely v. State, No. 02A05-0704-CR-222, slip op. at 4 (Ind. Ct. App. May 20, 2008). In addition to disparagingly comparing El-Khatib's character to Blakely's, the trial court also suggested that the Blakely decision was "crap" and urged the State to seek transfer. Tr. p. 10. Although we understand that trial court judges sometimes do not agree with the decisions we make, to refer to one of them as "crap" on the record is more than impolite. Tr. p. 10. These comments are crude, offensive, and contravene the requirements of a judge to apply the law fairly

> circumstances nine felony convictions, three probation revocations, prior attempts at rehabilitation have failed; find no mitigators; order you committed to the Department of Correction for three years on Count I; three years on Count II. As an additional aggravator, I'll find the fact that you've accumulated all these convictions at the -- prior to being -- well, twenty-three years old; also the fact that this 723 case involves a different victim; order that that sentence -- this sentence runs consecutive to that sentence in 723.

Tr. pp. 12-13. El-Khatib now appeals.

Analysis

I. Abuse of discretion

El-Khatib first argues that the trial court improperly failed to consider his guilty plea and age as mitigating. In reviewing a sentence imposed under the current advisory scheme, we engage in a four-step process. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal only for an abuse of discretion. Id. Third, the weight given to those reasons—the aggravators and mitigators—is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

On rehearing in Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007), our supreme court addressed the same issue. Our supreme court acknowledged:

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and impartially and to be courteous to litigants. See Ind. Judicial Conduct Canons 2.2, 2.8(B) (formerly Ind. Jud. Conduct Canons 2(A), 3(B)(4)).

> We have held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility . . . or when the defendant receives a substantial benefit in return for the plea.

Anglemyer, 875 N.E.2d at 220-21 (citations omitted) (emphasis added).

El-Khatib has not established that his guilty plea and age are significant mitigating factors overlooked by the trial court. During the sentencing hearing, the prosecutor indicated that El-Khatib pled guilty quickly to avoid an habitual offender enhancement, which she "fully planned on" filing. Tr. p. 7. It appears that El-Khatib's extensive criminal history would have supported such a filing. Because he benefited from pleading guilty and avoiding such an enhancement, El-Khatib has not established that his guilty plea was a significant mitigator.

As for his age, twenty-three year old El-Khatib acknowledges that defense counsel did not assert his age as a mitigator and suggests that the trial court should have considered it because it was "inherently aware" of his age. Appellant's Br. p. 10. Assuming this issue is not waived, El-Khatib has not established that his age was a significant mitigator.

"Focusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry. There are both relatively old offenders who seem clueless and relatively young ones who

appear hardened and purposeful." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). El-Khatib's criminal history is extensive and includes juvenile adjudications, misdemeanor and felony convictions, and probation revocations. Given his criminal history, El-Khatib falls into the category of a hardened and purposeful offender. It was within the trial court's discretion not to give El-Khatib's age mitigating weight.

El-Khatib also argues that the trial court abused its discretion in ordering this sentence to be served consecutive to his other existing sentences. He claims that the credit card convictions and one of his previously imposed sentences for auto theft were a non-violent episode of criminal conduct. As such, he claims his consecutive sentences should be capped at the advisory sentence for a Class C felony. See Ind. Code § 35-50-1-2. In support of his argument, El-Khatib references the probable cause affidavit and summarily asserts, "The record is clear that the crimes in FD-723 and the current case were closely related in time, place, and circumstance." Tr. p. 14.

The auto theft and credit card incidents are related only to the extent that the credit card incident was discovered "during the course of an unrelated investigation regarding the theft of a Fort Wayne Police Department vehicle from the City Garage . . . ." App. p. 13. Although the basis for the credit card charges was discovered during the investigation of the stolen car, there is no indication that the crimes were an episode of criminal conduct, which is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b). The mere fact that the investigation of one offense lead to the discovery of another crime does not make the offenses an episode of criminal conduct. El-Khatib has not shown that the trial court

abused its discretion in ordering this sentence to be served consecutive to the auto theft sentence.

El-Khatib also claims that the auto theft and credit card offenses should have been charged together. El-Khatib, however, did not move to dismiss the credit card charges as required by Indiana Code Sections 35-34-1-10(c) and 35-34-1-4(a)(7). As our supreme court has observed, "The law is clear that defendant's challenge to the information must be by written motion to dismiss filed prior to trial." Wright v. State, 474 N.E.2d 89, 91 (Ind. 1985). Where no such motion was filed, the defendant fails to preserve any error relating to the propriety of the information. Id.

Waiver notwithstanding, as we have discussed, El-Khatib has not established that these offenses were of a the same or similar character or based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan. See I.C. § 35-34-1-9(a) (defining circumstances in which offenses may be joined). The record only shows that during the course of investigating a stolen car, police officers discovered that El-Khatib had used a stolen credit card; it does not establish that joinder was permitted or that successive prosecutions were barred. See I.C. § 35-41-4-4 (describing when a prosecution is barred). This claim also fails.

II. Appropriateness

El-Khatib also claims that his three-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision.

Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

El-Khatib argues that the nature of the offense is not significant because the victim did not seek restitution or make a victim's impact statement. Although it would be helpful, we will not use victim's lack of participation in the criminal justice system as a basis for analyzing the appropriateness of El-Khatib's sentence. Moreover, El-Khatib failed to include a transcript of the guilty plea hearing on appeal. Accordingly, we have no record of the factual basis supporting his guilty plea,[2] and El-Khatib has not established that given the nature of the offenses his three-year sentence is inappropriate.

Regarding the character of the offender, El-Khatib's criminal history is extensive, especially when considering his age. It includes four juvenile delinquency adjudications, two misdemeanor convictions, and nine felony convictions. The prior felony convictions include multiple convictions for theft, receiving stolen property, and fraud. El-Khatib is either unwilling or unable to conform his behavior to the constraints of the law and continues to commit the same types of crimes. Although El-Khatib pled guilty, his extensive criminal history warrants the three-year sentence.

El-Khatib argues that he received the maximum sentence and that he neither committed the worst offense nor is the worst offender. As the State points out, however,

[2] Because it is not clear that El-Khatib admitted to those facts, we decline to analyze the nature of the offense based on the probable cause affidavit.

the maximum sentence El-Khatib faced for the two Class D felonies was four years[3] and he was sentenced to three years. El-Khatib's maximum sentence argument is unavailing.

Conclusion

El-Khatib has not established that the trial court abused its discretion in sentencing him or that his sentence is inappropriate. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

[3] We assume the State's calculations of the maximum sentence is based on the fraud and receiving stolen property being an episode of criminal conduct, capping the sentence at the advisory sentence for a Class C felony—four years. See I.C. § 35-50-1-2.